No. 4122

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE MOHAWK RUBBER COMPANY OF NEW YORK, INC., a Corporation,

Plaintiff in Error,

vs.

EDGAR J. MUNNELL and ARTHUR J. SHERRILL, Individually and as Copartners Doing Business Under the Firm Name and Style of MUNNELL & SHERRILL,

Defendants in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

S. J. Bischoff,
Beach & Simon,
Attorneys for Plaintiff in Error.
Cake & Cake,
L. A. Liljeqvist,
Attorneys for Defendants in Error.

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Reply Brief of Plaintiff in Error.

In point I defendants in error assert that "*agency* and the *authority* of the agent may be proved by the testimony of the agent on the witness stand," and cite in support thereof Hinton vs. Roethler, 90 Or. 440, and Larkin vs. Carstens, 80 Or. 104. The question of the existence of the agency is not involved in this case. It is admitted that Fitzgerald was plaintiff's agent. The only question involved is whether the contracts claimed to have been made by him were within the *scope of his authority.* Neither of the cases referred to decide that the agent may testify to the *bare conclusion* that "I have authority" to do thus and so, and hence do not sup-

port the latter part of the assertion. In neither case did the agent testify to the bare statement that he was an agent or that he had authority to make the contract. The alleged agent in each case testified to the *conversations and communications* that passed between himself and the alleged principal and it was held that by this testimony the agency could be established, but nothing was said in either case as to establishing the scope of the agency by his bare conclusion that he had authority, which is the question presented in this case.

The only evidence referred to by defendants as constituting proof of the *scope* of Fitzgerald's authority is at page 111 of their brief and is as follows:

> Q. In other words, the things that you did—
> A. I was within my authority.
> Q. The contracts that you did make and the deals you did consummate with the people with whom you dealt, you did have authority for those things, didn't you? A. I did.

This is merely culling a single question and answer from the body of the evidence and standing by itself might be construed as Fitzgerald's *conclusion* as to the scope of his authority. But as was said in Aetna Indemnity Co. vs. Ladd, 135 Fed. (9th Cir.) 636, "His statement could not bind the plaintiff in error, nor prejudice his rights," and as was said in Keane vs. Pittsburg, 105 Pac. 60 (where the agent was asked "you had full authority to make that agreement"), "it was not what the witness' opinion may have been as to

what his authority was that determined his authority, but such authority must be determined from the *facts.*"

This question and answer cannot, however, be taken alone. It must be read in the light of all his evidence and when that is done, it is very apparent that what he meant by that statement was that he had the authority to make the concessions that he did make, *because he had received express instructions in respect thereto in each instance* in which he made an arrangement that was not a part of his duties of selling merchandise. The evidence establishes beyond question that in each instance he sought express permission to make whatever concession was being requested by defendants in error and in those instances where the requests were granted it was only after express permission had been received from the home office. In every specific instance referred to by defendants it was shown that the concession was made as a result of express permission covering that particular concession.

At pages 109 and 140 of the brief of defendants in error an attempt is made to spell out the authority of Fitzgerald to make the contracts referred to in the answer as *incidental* to the alleged right of Fitzgerald to make *territorial arrangements* with distributors. But no attempt is made to indicate how the right to make territorial arrangements with distributors (which is an incident to the business of the sales manager) can include the right to cancel notes held by the principal, to relieve a

debtor from liability for the purchase price of merchandise, to make agreements for unlimited protection against declines in price, no matter when the merchandise was bought or when the price declined or to bind the principal by an agreement which would result in the return of a large quantity of merchandise after it had been sold and delivered a long time and the customer had become liable therefor. Nor is it possible to conceive how these things can be incidental to the right to make territorial arrangements or what one has to do with the other, especially in view of the fact that defendants in error were distinctly told,

> "when it comes to credits, return of unsold merchandise and things of that caliber, you are dealing with our credit department, because after we (meaning Fitzgerald) have made a sale of goods then the matter passes out of our hands to those of the credit department at Akron, and we have no authority to take action on matters pertaining to their department." (Exh. KK, Trans., p. 188.)
>
> (Parentheses ours.)

II.

The attack upon the judgment by reason of the misconduct of trial counsel for defendants in error is met by a mighty effort to preclude or prevent a consideration of the phase of the case by challenging the sufficiency of the assignment of errors.

It must be remembered that with respect to the question of misconduct of counsel, we do not claim that the *Court* committed error in respect thereto *during the trial,* for the Court sustained the ob-

jection of the plaintiff in error in each instance in which defendant in error attempted to introduce the same objectionable matter before the jury. There was no error committed by the Court in this respect *during the trial.* It is with the conduct of the counsel for defendants in error *during* the trial that we find fault with and it is this conduct that we ask the Court to review.

After the jury rendered a verdict for defendants we asked the Court to set it aside and to grant a new trial on the ground that the verdict was brought about by this misconduct (among other grounds) and the refusal of the trial court to grant the motion we assign as error. That is the first place that the Court committed error in respect to this subject, if any there be, for theretofore the Court's rulings had been correct. This error was committed *after* the trial and not *during* the trial. Hence the assignment in this respect could not be of error during the trial but had to be for error in the ruling on the motion for a new trial.

A great deal of space is devoted to the proposition that it was necessary for the assignment of errors to call attention to each instance of misconduct and to set out what transpired in each instance. The assignment of error in this respect is:

IV.

The Court erred in denying plaintiff's motion to set aside the verdict and judgment entered thereon and to grant a new trial, which motion was based upon the following grounds:

1. Misconduct of counsel for defendants in bringing to the attention of the jury on numerous occasions prejudicial matter after the Court had repeatedly ruled that such matters were immaterial and not within the issues."

Rule 11 of this court requires "an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged."

. . . when the error alleged is to the *admission or rejection of evidence, the assignment shall quote the full substance of the evidence* admitted or rejected. When the error alleged is to the charge of the Court the assignment shall set out the part referred to *totidem verbis.*"

It will be observed that *only* in *the cases of errors in the admission* or *rejection of evidence* and *in the giving or refusal to give an instruction* by the Court that each specific error alleged must be referred to and the testimony or charge as the case may be must be set out. These, of course, have reference to errors alleged to have been committed by the *Court* during the trial. *There is no requirement that each specific act of misconduct should be set out.* The only thing that is apparently required is that the general character of misconduct should be specifically set forth and this we did when we said that it consisted of bringing to the attention of the jury on numerous occasions prejudicial matter *after* the Court had repeatedly ruled that such matters were immaterial and not within the issues. That was one character of misconduct as distinguished from other acts of misconduct which one could

be guilty of and in so far as the *Court* was concerned, it committed error in this respect in one instance only and that was *when it overruled the motion for a new trial* based upon this ground.

In support of this assignment of error we call attention in our main brief to *eight* specific instances, quoting in full what had transpired and referring in each instance to the place in the record where it can be found. All of the instances deal with the same matter, namely, the attempt to get to the jury the idea that plaintiff in error had sold to defendants in error defective merchandise which caused them great loss, when there was no such defense interposed. No allegation appeared anywhere in the pleadings which would make such evidence admissible directly or collaterally, and the persistence of counsel in that attempt after the Court had *emphatically* informed defendants' counsel that such evidence was not admissible.

It is also urged that the misconduct was not excepted to. It is our understanding that only *rulings* of the Court *are excepted to* if we believe them to be erroneous, but as to conduct of counsel we can do no more than object thereto if we believe it to be improper. Counsel does not make any rulings and therefore require no exceptions. In this case we not only objected strenuously in each instance, but we specifically noted on the record that the attempts to bring the improper matter to the attention of the jury was assigned as misconduct on at least two occasions. (Trans., pp. 271 and 409).

The fact is, however, that on at least two occasions exceptions were noted to this misconduct. (Trans., pp. 38 and 272.)

The requirement for the "full substance" of the evidence spoken of on page 115 of defendants' brief has reference to errors in the admission or rejection of evidence only. (Rule 11.)

On page 119 of defendants' brief it is urged that because a number of letters were received in evidence, some without objection, in which there was something said about the quality of the tires that defendants were justified in attempting to introduce, the objectionable matter referred to even after the repeated rulings of the Court to the contrary. The only issues in the case as it was tried and as presented by the pleadings was whether certain contracts were made and the scope of the agent's authority. There was no issue involving the quality of merchandise. Hence the letters admitted could only have been admitted for the purpose of determining those issues only and could not be considered for any other purpose.

In Waldron vs. Waldron, 156 U. S. 361, an action for the alienation of affections, a judgment-roll had been admitted in evidence without objection to prove that plaintiff had been legally divorced but in the argument counsel called attention to the fact that the divorce was obtained on the ground of adultery, which appeared from the judgment-roll, and Mr. Justice White held:

> "It is clear that where evidence is admitted for one purpose only, the mere fact

> that its admission was not objected to at the time does not authorize the use of it for other purposes for which it was and could not have been legally introduced."

And so here counsel cannot justify his conduct because some casual reference is to be found in some of the correspondence as to the quality of the tires, especially in view of the fact that adjustment had been made for all defects.

Counsel discuss at great length the right to make of proof when evidence is rejected. This rule was not established for the purpose of enabling counsel to bring to the attention of the jury objectionable matter by indirect means, especially after the Court had repeatedly ruled against the admission of such matter and where there is no possible justification for the attempt to introduce it either in the pleadings or in the evidence. It is the *abuse* of *this rule* by defendants' counsel that we complain of. It will not do in this case for counsel to attempt to justify his conduct by the excuse that he was making an offer of proof or arguing the admissibility of evidence, for he was bound to know from the very beginning that the matter referred to did not have the remotest connection with the issues presented by the pleadings. It was not to be introduced for the purpose of attacking the credibility of any witness or to refresh his recollection, or for any other legitimate purpose for which evidence may be offered. But even if we were to assume that counsel did not know that such evidence was inadmissible

when it was first introduced, he certainly knew it after the Court ruled it down at the outset.

At page 130 of defendant's brief, under the title "Evidence Sufficient," considerable space is devoted to the proposition that this Court will not consider the weight of the evidence, and as to the effect of the verdict of the jury, we do not question the rules of law announced in the cases referred to, but they have no bearing upon the question presented by the writ of review in this case. Our contention is that there is *no evidence* to support the verdict, because there is no evidence that Fitzgerald had authority to make the contracts relied on.

It is also urged that the verdict should not be disturbed because plaintiff in error took no exceptions to the instructions of the Court to the jury. Our complaint here is not with reference to the instructions. The fact is that the Court adopted the view of the law as contended for the plaintiff in error, which was to the effect that where one dealing with an agent knows that his authority is limited, a recovery on the contract made with the agent can only be had on proof of express authority. We contend that since the evidence established definitely that defendants knew the limitation of Fitzgerald's authority, that they were required to establish his authority to make the contracts they rely on by proof of *express* authorization. There is no such proof in the record and counsel for defendant in error does not call attention to any, and hence the verdict is not supported by evidence.

At page 136 of defendants' brief an attempt was made to show that there had been a ratification. The claim of ratification is made here for the first time. The pleadings are silent as to ratification. No such contention was made in the court below nor was the case submitted to the jury under any instructions which would permit a recovery for defendants on the theory of ratification. This is merely an attempt by defendants in error to save themselves by grasping at a straw. It is urged that because plaintiff gave defendant credit for some of the merchandise for which defendants were reliable that that constituted ratification of an unauthorized agreement by which defendants would be relieved of liability for merchandise purchased and from notes given in payment therefor.

It is elementary that receiving that which one is entitled to receive does not constitute a ratification of any unauthorized acts. The rule with respect to ratification is very clearly stated in 2 C. J. 495, as follows:

> "When Rule Not Applicable.—The above general rule of course has no application where the principal receives no benefit from the agent's act, or where the benefit received is doubtful and trifling; nor does the general rule apply where the principal is entitled to what he has received without assenting to the act of the agent, and he does not otherwise give his approval to such act, or where the benefit received by the principal is merely incidental and arises out of a credit extended by a third person to the agent individually."

The foregoing text is supported by numerous decisions, among them being the case of Baldwin Fertilizer Co. vs. Thompson, 32 S. E. 591, in which it was held that if the principal merely receives back his own property, which was in the custody of another and to which he was unconditionally entitled, he does not thereby ratify any unauthorized agreement made by his agent under which the possession was restored, in the absence of any other evidence of a ratification of such act.

In Torrence vs. Sheed, 112 Ill. 466, it was held that where an agent makes an unauthorized contract for a sale of land to a tenant of his principal, the fact that the principal has knowledge of the contract and collects a small sum of money from the tenant, who at the time of the contract was in arrears for rent under his lease, is not a ratification of the contract of sale.

In the case at bar the only act which it is claimed constitutes a ratification was the issuance of a credit by plaintiff to defendants for part of the merchandise theretofore sold. This does not constitute consideration for an agreement by the agent to relieve defendants from liability for the balance of the purchase price, or from liability on the notes taken in part payment.

Toward the close of defendant's brief attempt is made to justify the conduct of counsel in attempting to introduce evidence as to defective conditions of tires and that defendants suffered great loss thereby. From an examination of the argument used it will be at once apparent that this justifica-

tion could only be available if defendant in error had pleaded an agreement for cancellation of indebtedness because of defective condition of tires or had pleaded a defense or counterclaim based on breach of warranty or similar plea. But in the absence of anything in the pleading, making the question as to the condition of the merchandise material, the attempt to inject that matter into the case, after the repeated adverse rulings of the Court, was manifest misconduct.

Respectfully submitted,

S. J. BISCHOFF,

Attorney for Plaintiff in Error.